Supreme Court, U.S.
FILED
971341 FEB 17 1998
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MONEM KABIR

Petitioner

VS.

SILICON VALLEY BANK
ROBERT MCMILLAN
MICHAEL HANSEN

On Petition for Writ Of Certiorari
To The California State Supreme Court

PETITION FOR WRIT OF CERTIORARI

MONEM KABIR
In Propria Persona
4557 CELIA COURT
FREMONT, CALIFORNIA 94555
(510) 797-6472

38 pp

This petition raises the question of equal protection under the law and due process for the rights of indigent litigants in the California civil courts; specifically whether California Rules of Court, Rule 7, and its implementation, pass Constitutional muster under the Fourteenth Amendment to the United States Constitution.

I. **Does California Rules of Court, Rule 7, afford indigent litigants equal protection under the law and due process under the provisions of the Fourteenth Amendment to the United States Constitution ?**

II. **Is it lawful for the California Appellate Court to award sanctions on appeal against an unsuccessful indigent litigant based upon an unconstitutional statute and interpretation under the Fourteenth Amendment?**

TABLE OF CONTENTS

PAGE NUMBER

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE PETITION.....10

CONCLUSION.....18

INDEX TO APPENDICES

APPENDIX A — Decision of State Court of Appeals

APPENDIX B — Decision of State Trial Court

APPENDIX C — Decision of State Supreme Court Denying Review

APPENDIX D — Decision of State Court of Appeals Petition denied and application for waiver of court fees and costs is granted

APPENDIX E — Order of State Trial Court for Settlement of Statement Pursuant to Cal. Rules of Ct. 7(d)

APPENDIX F — Decision of State Supreme Court Denying Review

TABLE OF AUTHORITIES CITED

CASE PAGE NUMBER

1. *Barbier v. Connolly*, 113 U.S. 27, 32 (1885).....15
2. *Boddie v. Connecticut*, 401 U.S. 371 (1971).....13
3. *Crespo v. Superior Court of the County of Los Angeles*, 41 Cal. App. 3d 115 (1974).....13
4. *Douglas v. California*, 372 U.S. 353, 361 (1963).....16
5. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).....16
6. *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).....15
7. *Griffin v. Illinois*, 351 U.S. 12 (1956).....16
8. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966) *Id.*, 668.....17
9. *Keller v. Superior Court in and for the County of Los Angeles*, 100 Cal. App. 2d 231 (1963).....14
10. *Leslie v. Roe*, 41 Cal. App. 3d 104 (1974),.....13
11. *Quail v. Municipal Court*, 171 Cal. App. 3d 572 (1985).....2, 14
12. *San Antonio School Dist. V. Rodriguez*, 411 U.S. 1 (1973).....16
13. *Smith v. Superior Court of the County of Los Angeles*, 41 Cal. App. 3d 109 (1974),.....13
14. *Tigner v. Texas*, 310 U.S. 141, 147 (1940).....15
15. *Williamson v. Lee Optical Co.* 348, U.S. 483, 489 (1955).....15

STATUTES AND RULES

Fourteenth Amendment, Section One, to the United States Constitution.....1, 12, 13, 14, 15

28 U.S.C.§ 1257(a). State courts; certiorari 1, 2

Cal. Rules of Ct., Rule 7.....2, 3, 4, 8, 10, 11, 12, 13, 14, 15, 16, 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California appears at Appendix "C" to the petition and is unpublished.

The opinion of the California Appeals Court, Sixth District, appears at Appendix "A" to the petition and is unpublished.

JURISDICTION

The date on which the Supreme Court for the State of California denied my petition for review was November 19, 1997. A copy of that decision appears at Appendix "C".

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, Section One, to the United States Constitution.

The Fourteenth Amendment of the United States Constitution, section one, states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C.§ 1257(a). State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Cal. Rules of Ct., Rule 7, provides an alternative procedure to obtaining a Reporter's Transcript for indigent litigants in the California Civil Appeals process as follows:

"Rule 7. Settled statement

(a) [Applicability--appellants who qualify] An appellant may use the procedure in this rule in lieu of a reporter's transcript only (i) if the appellant is without adequate funds to order and pay for a reporter's transcript and funds are not available for a transcript from the Transcript Reimbursement Fund administered by the Certified Shorthand Reporters Board, or (ii) if a transcript is unavailable because of the absence of a reporter or the loss or illegibility of the reporter's notes, or (iii) if allowed by the trial judge on noticed motion, on the ground that a substantial saving of cost would be achieved and a statement can be settled without significant burden on the opposing party or on the court. A party who has proceeded in the trial court in forma pauperis is deemed without adequate funds for a transcript; other parties may establish that they are without adequate funds upon a motion for leave to use the procedure provided in this rule.

(b) [Proposal of narrative statement] If, in lieu of a reporter's transcript, the appellant is permitted to set forth the oral proceedings by a settled statement, the appellant may serve and file a notice stating an intention to do so within 10 days after filing the notice of appeal. Within 30 days thereafter the appellant shall serve and file a condensed statement in narrative form of all or such portions of the oral proceedings as are deemed material to the determination of the points on appeal. If necessary for accuracy, clarity, or convenience, portions of the evidence may be set forth by question and answer, subject to the approval of the court in settling the statement. If the condensed statement purports to cover only a portion of the oral proceedings, the appellant shall state the points to be raised on appeal, and in that event shall be precluded from presenting any grounds for reversal not embraced within the points stated unless the reviewing court, on motion, permits the appellant to present additional errors or grounds of appeal on such terms as it may prescribe. Within 20 days after service of the narrative statement, the respondent may serve and file proposed amendments thereto. The appellant's condensed statement and the respondent's proposed amendments may incorporate any instructions given or refused which the party deems material.

(c) [Settled statement in lieu of both transcripts] If the appellant is permitted to use the procedure provided for in this rule and desires to present the appeal wholly on a settled statement in lieu of both a reporter's and clerk's transcript, the appellant shall serve and file a notice so stating within 10 days after filing the notice of appeal and, in that event, the provisions of subdivision (b) shall be applicable. The appellant's proposed statement shall contain in addition to the condensed statement of the oral proceedings copies of the following: (1) the judgment roll or the portions deemed material to a determination of the points on appeal, and if there is no judgment roll, the judgment appealed from; (2) the notice of appeal; (3) the notice to the clerk of election to proceed by a settled statement; (4) the pretrial order, if any, if the statement contains a copy of the judgment roll or any part of it; and (5) any notice of intention to move for a new trial or motion to vacate the judgment, the ruling, if any, and a recital or resume of any oral proceedings. The appellant's

proposed statement, and the respondent's proposed amendments, may include any other papers or records which either party might have had incorporated in the clerk's transcript under the provisions of rule 5. Both the statement and the proposed amendments may be accompanied by a list of the exhibits admitted in evidence or rejected that the party desires to have transmitted as originals as provided in rule 10.

(d) [Settlement and engrossment] On the filing by the respondent of the proposed amendments or on the expiration of the time to file (whichever shall first occur), the clerk shall set a time not more than 10 days thereafter for settlement of the statement by the judge who tried the case and shall give not less than five days' notice to all parties of the time set. At the time set, or at the time to which the judge may continue the hearing, the judge shall settle the statement and fix the time within which the appellant shall engross it as settled. Within the time fixed, the appellant shall engross the statement in accordance with the order of the judge and shall serve and file the engrossed statement. If the respondent does not serve and file objections to the engrossed statement within five days, it shall be presumed that it is engrossed in accordance with the order of the judge and shall be presented by the clerk to the judge for certification. If the parties stipulate that the statement as originally served or as engrossed is correct, the stipulation shall have the same effect as if certified by the judge."

STATEMENT OF THE CASE

This Petition arises from an civil action filed in March of 1992, *Kabir v. Silicon Valley Bank, et al,* Santa Clara County Superior Court Case No.: 719610. What remained of the action by trial in April of 1995, following the bankruptcy of several parties, were claims by Kabir (herein after referred to as Petitioner) and his co-plaintiff Ruebusch against various defendants for defamation and interference with contractual relations. The defamation claims and the interference with contract claims were directed solely against the Silicon Valley Bank, Robert McMillan, and Mike Hansen, (hereinafter referred to as Respondents). Silicon Valley Bank had also filed cross-claims against plaintiffs.

Petitioner worked for USM Technology, Inc. (hereinafter referred to as "USM"). USM's relationship to Silicon Valley Bank (herein after referred to as "SVB") began in late 1990 and grew to the point where all of USM's banking business was performed by SVB by June of 1991.The Petitioner carried the title of CFO at USM, but had no cash signatory responsibility.

During the summer of 1991, conflicts began to develop between Petitioner and Robert McMillan of SVB. McMillan demanded financial information from Petitioner and other officers of USM , financial information which was confidential, proprietary, and beyond the scope of the Bank's loan agreements with USM. At the direction of the board of directors of USM, Kabir informed McMillan that only the agreed upon financial data would be supplied to SVB.

This initiated a series of personal conflicts between Petitioner and Defendant, Mr. McMillan. USM requested that Mr. McMillan be removed from the account. The president of SVB, Roger Smith, directed that McMillan be replaced by another banking officer.

Conflicts with the Bank increased, rather than decreased.

SVB officers, including McMillan, urged the majority owner of USM to terminate the employment of Petitioner and Ruebusch.

In early February, 1992, Ruebusch reported to SVB to that the majority owner of USM was either diverting corporate funds or withholding funds from deposit on the Bank in violation of the Bank loan agreements. This disclosure prompted a meeting between USM management and Silicon Valley Bank representatives. At this meeting, the majority owner of USM admitted that he was withholding funds from the bank and USM. Mr. McMillan was aware that these checks were being withheld from the bank and USM. A couple of days before this meeting, Petitioner had been terminated by USM. Within a week of this meeting, the president, Mr. Ruebusch was also terminated, by USM. Accusations were made that both Petitioner and Mr. Ruebusch had stolen money from USM and committed other wrongful acts both as to USM and SVB.

In March of 1992, Petitioner and Ruebusch filed lawsuits against USM, Silicon Valley Bank and others. In September of 1992, SVB filed a Cross-Complaint for fraud against both the Petitioner and Mr. Ruebusch. From February of 1992 to September of 1992,

USM was under a receivership under the direction of SVB agent, Won Choe. USM filed for bankruptcy protection in September of 1992. After the SVB agent replaced the Petitioner at USM and this lawsuit was filed, a reporter for the Business Journal contacted several of the Defendants for comment regarding the action. In the context of this interview, Defendants, SVB officer Mike Hansen and SVB agent Won Choe made defamatory statements about Petitioner. The newspaper reporter who wrote this article testified that the individuals identified as such in fact made these statements to him.

In pre-trial preparation of the case, Petitioner and Mr. Ruebusch discovered numerous irregularities in the Bank documents. For example, a Bank officer had filed verified pleadings in the State Court and the Bankruptcy Court asserting, under oath, that SVB loaned USM $180,000.00 in October, 1990. The Bank was aware then and further admitted in verified oaths in a subsequent court case now pending before the Superior Court in Santa Clara County, that this allegation was false. Said loan, which formed the basis of SVB's Cross-Complaint, was never made. (In August of 1996, a new action was filed by Petitioner and Mr. Ruebusch against SVB and its banking officers based upon the irregularities surrounding the $180,000.00 loan and a $1,000,000.00 line of credit, alleging fraud, fraudulent concealment, deceit, conspiracy to defraud, and intentional interference with economic relationship.)

In order to inform the public of the banking irregularities and how the local community of Santa Clara County supports the actions of a prominent bank, the Petitioner began to publish a newsletter, "Do You Know The Truth Newsletter". In August 1995, the newsletters were the subjects of applications for restraining orders, which were denied by the court. However, the political impact of said newsletters continued.

On August 28, 1995, a 15-day civil jury trial began in the Superior Court of the State of California in and for the County of Santa Clara for this action, before the Honorable Judge John F. Herlihy. Entry of judgment for this proceeding was filed on October 6, 1995 (A true and correct copy of the judgment is attached hereto as Appendix "B"). Upon completion of the trial, in or about October, 1995, Petitioner's legal counsel ended the contingency fee based relationship resulting in the Petitioner handling his appeal *In Propria Persona* and in *forma pauperis*.

The Petitioner filed a Notice of Appeal on December 1, 1995, with the Sixth Appellate District. In addition to the issue of inconsistent judgment upon jury verdict, and other issues, the Appellant raised the issue of the appropriateness of the jury instructions given by the trial judge. While the jury found in favor of Petitioner's co-plaintiff for libel, it nevertheless also found that Petitioner had engaged in "criminal activity" (the phrase in the libelous newspaper interview) on the appellant's claim, and denied his recovery. Yet, the jury was not instructed as to "criminal activity," nor was the jury instructed to make findings of fact on that issue. Further, no evidence was introduced at trial regarding alleged criminal activity.

Inconsistent with its finding of "criminal activity" on plaintiff's (Petitioner's) complaint, the jury ruled against Silicon Valley Bank on its cross-complaint for fraud, conspiracy and misrepresentation.

In or about December 1995, the Petitioner requested the Transcript Reimbursement Fund administrated by the Certified Shorthand Reporters Board to qualify the Petitioner as an indigent so as to obtain a copy of the court reporter's transcript. The Petitioner was informed that there were no funds and there probably would not be funds soon.

Having exhausted all other means, on December 27, 1995, Petitioner, unaware of California Rules of Court, Rule 7, filed an application for waiver of court reporter's and clerk's transcript fee, or, in the alternative, a six-month extension of time in order to raise the necessary funds to purchase said transcripts in order to prepare brief. On January 4, 1996, the Sixth Appellate District suggested through letter, that the Petitioner should proceed with his appeal under Cal. Rules of Ct., Rule 7, and extended time for Petitioner to make said application.

On February 8, 1996, Petitioner filed his notice to proceed under Cal. Rules of Ct, Rule 7, and file a narrative condensed "settled statement," in lieu of a court reporter's transcript, stating seventeen different issues to be raised upon appeal.

On June 10, 1996, Petitioner filed the Appellant's Settled Statement in the Superior Court before the Honorable John F. Herlihy. On July 1, 1996, Defendant, SVB, filed an Amendments To Settled Statement and hearing was held on August 28, 1996.

On September 3, 1996, the Honorable John F. Herlihy, contrary to express provisions of Cal. Rules of Ct., Rule 7(d), ordered that the Respondents' Amendments To Settled Statement become the Engrossed Settled Statement without any inputs from the Petitioner. By engrossing Respondents' Amended Settled Statements, the court prevented the Petitioner from presenting facts necessary to present his issues on appeal. Thus, without the courtroom transcripts, there was no evidence to show that testimony had not been stated at trial. While a settled statement may reflect what testimony has occurred, it does not indicate negative evidence; that certain testimony had not occurred, i.e. jury instructions on libel and affirmative defenses.

On September 6, 1996, Petitioner filed a petition for writ of mandate, prohibition, certiorari, or other appropriate relief with the California court of Appeals, Sixth Appellate District on the mishandling of the Settled Statement by the Superior Court. It was denied on September 12, 1996. On September 23, 1996, the Petitioner filed a petition for review to the Supreme Court for the State of California regarding the inconsistent judgment and the trial court's ruling regarding the Settled Statement being engrossed by the Respondents.' The legal issues on appeal to the Supreme Court were whether Cal.Rules of Ct. had been followed by the trial court and whether or not Kabir should be provided with a reporter's transcript. Petitioner argued that when he was denied access to the reporter's transcript, when both the court and Respondents had copies, the settled statement was open to misrepresentation and manipulation by the Respondents, resulting in prejudice and unfair advantage to him. The California Supreme Court denied the petition on November 20, 1996.

The Petitioner filed his opening brief with the California Court of Appeals on December 10, 1996, consisting of two issues on appeal. The issues being:

1. The Special Verdict For Claims By Plaintiff, Monem Kabir, question number19, rendered by the jury was not confined to the issues before the court and was inconsistent with the jury instructions given, inconsistent with the trial evidence, and inconsistent with the law. As a result of these errors, a material miscarriage of justice has occurred and warrants review by this court.

2. Respondents introduced evidence at trial on their affirmative defense that alleged libelous statements were true; i.e. that "Kabir was incompetent in his business affairs." Despite pre-trial discovery requests, this evidence was not produced until trial. It was a reversible error that this information was allowed into evidence over the objection of counsel. As a result of this error a material miscarriage of justice has occurred and warrants the review of this court.

A Respondent's Brief was filed by the defendants and the Petitioner filed an additional Reply Brief.

Respondents filed a Notice Of Motion And Motion For Sanctions on January 21, 1997, based on their assertion that an individual representing himself as an indigent, *in propria persona,* could not argue the law and therefore his appeal had to be filed as a delay and not in good faith. The Petitioner filed an Opposition To Respondents' Motion For Sanctions on January 28, 1997.

On April 24, 1997, the Petitioner filed a request for oral argument with the Court of Appeal. While waiting for the assignment of a date for the oral argument, additional evidence was discovered by Petitioner in the form of a letter from the Respondents' attorney which had been prepared to the court at the time of trial and which was missing from the court clerk's transcript. This letter stated that both sides had stipulated to the exclusion of evidence at trial Petitioner's attorney objecting to and stipulating with the opposing counsel not to use the words from the subject newspaper article which contained the phrase "criminal activity". This related directly to Petitioner's second issue on appeal. An application to augment or correct the records was filed on May 15, 1997, by the Petitioner in the Appeals Court.

The Application to augment the record was denied by the Court of Appeal on July 3, 1997.

On May 30, 1997, the Court of Appeal notified the Petitioner that the court was considering imposing sanctions on him.

The Court of Appeal set the oral argument hearing for July 10, 1997. On July 3, 1997, the Court denied the application for augmentation of the court clerk's transcript.

In early July, 1997, the Petitioner was able to retain *pro bono* legal representation for the oral argument hearing date which

had been set for July 10, 1997. At the hearing date, Petitioner's legal counsel was stopped from addressing the court regarding the merits of the appeal and the courts confined him only to the issue of sanctions.

On September 11, 1997, the court filed the order and (unpublished) opinion. In this opinion, Appendix "A", the appeal before the court was denied and $10,000.00 in sanctions were levied upon the Petitioner *In Propria Persona* and *in forma pauperis.*

A Petition For Review was timely filed on October 17, 1997, within the statutory time permitted under California Rules Of Court, Rule 24. This argument presented the inconsistent application of the law by the courts which was barring an indigent representing himself *in propria persona* from equal access to justice as required under the United States and California Constitutions. Further the petitioner argued, the imposition of sanctions by the California Appeals Court seemed to be nothing more than a penalty for being poor.

On November 18, 1997, the California Supreme Court denied the petition for review.

REASONS FOR GRANTING THE PETITION

This petition raises the question of equal protection under the law and due process for the rights of indigent litigants in the California civil courts; specifically whether California Rules of Court, Rule 7, and its implementation, pass Constitutional muster under the Fourteenth Amendment to the United States Constitution.

The actual effect of the implementation of Cal. Rules of Ct., Rule 7, was contrary to the intent of the law. The California Legislature attempted to remedy an injustice to indigent litigants. The practical application of the law has the opposite effect, abridging the privileges guaranteed to all citizens under the Fourteenth Amendment to the United States Constitution, specifically, the class of people it was designed to protect: indigent litigants. An indigent litigant is unable to pursue his claims against an opponent of superior economic strength under Cal. Rules of Ct., Rule 7. This is especially true when attorneys are economically unable or unwilling to finance appeals, and where the opposing party is a corporation, with all the financial resources at its disposal. Equal access to the courts becomes a myth, equal protection and due process become words without substance. The actual implementation of Cal. Rules of Ct., Rule 7,

does not provide equal access to indigent litigants, but merely creates another set of hurdles for indigents, protecting the needs of a select few, often "fictitious," persons.

In order for indigent litigants to have equal protection under the law, as well as due process, the issues outlined in the Petition must be remedied in favor of the class represented by Petitioner. If these issues are not addressed, an entire class of litigants will be denied access to the courts. Further, the problems outlined in this petition are not dispelled when counsel appears as here, *pro bono,* to argue the legal issues before the California Court of Appeals.

I.

ISSUE FOR REVIEW

I. <u>Does California Rules of Court, Rule 7, afford indigent litigants equal protection under the law and due process under the provisions of the Fourteenth Amendment to the United States Constitution ?</u>

Petitioner's trial attorney in the underlying litigation was unwilling and unable to take Petitioner's appeal from the underlying State Court judgment. Petitioner was unable to afford the services of attorney and chose to represent himself at the appeal. Grounds for the appeal were reversible error based upon inconsistent jury findings that (Plaintiff) Petitioner had engaged in "criminal activity." The jury was not instructed on the elements of libel containing such language, no affirmative defense instruction regarding 'truth of an utterance' was provided, and the issue that was not otherwise before the jury and the verdict was contrary to the evidence introduced in the case.

An appeal typically requires that a written record be supplied. The cost of a Reporter's Transcript is likely prohibitively expensive for a *pro per* litigant. Petitioner, found by the court to be indigent by declaration, filed his appeal under the "settled statement" provisions of California Rules of Court, Rule 7, as set forth above. These provisions, while purporting to assist indigent litigants, tend to place them in a credibility contest with the trial judge and opposing counsel, an inherently prejudicial situation. The result of this procedure was that the "Settled Statement" reflected Respondents' position only. There was no way for Petitioner to establish a record on appeal.

The trial court judge ignored the express provisions of the statute (Cal. Rules of Ct., Rule 7), as well as California case law, by engrossing Respondents' statement as the court's Settled Statement. The statute places control of the settled statement in the hands of the trial judge. The Appellate Court and the Supreme Court of the State of California refused to reverse the trial court in the face of the law. (*Quail v. Municipal Court,* 171 Cal. App. 3d 572 (1985) where it was error to have respondent, rather than appellant, engross the settled statement, and ordering the court to prepare new settled statement.) *Even if the law had been followed*, the indigent *pro per* Appellant is disadvantaged by virtue of Respondents' ability to purchase the transcript, to provide a selective interpretation of what occurred at trial, by having the advantage of collegiality with the bench, and trial judge. Any Appellant, similarly situated, would be unable to refute the statement even if his memory of the trial was perfect.

The Petitioner had no recourse from the provisions of Cal. Rules of Ct., Rule 7. With no transcript to rely upon, Petitioner was left with the impossible task of convincing a judge to accept his memory over the selective interpretations of an attorney and *the trial judge*. A record of the facts presented at trial showing that a reversible error had occurred in this case, was denied to Petitioner. Instead, the Trial Court judge (up on appeal) accepted Respondent's statement of the facts *in toto,* engrossing respondents' statement as the Settled Statement, denying Petitioner his rights to due process and equal protection. The practical application of Cal. Rules of Ct., Rule 7, is that the record before the California Appellate Court consists solely of Respondent's statements, not the trial transcript, and not a "settled statement." *The provisions of Rule 7 work in reverse; it is actually the non-indigent litigant who benefits from the Rule.*

II. Is it lawful for the California Appellate Court to award sanctions on appeal against an unsuccessful indigent litigant based upon an unconstitutional statute and interpretation under the Fourteenth Amendment?

The second issue presented relates to the sanctions imposed by the Court of Appeal against Petitioner based on Petitioner's failure to provide an adequate record for the Court of Appeal to review. The Court of Appeal sanctioned the Petitioner for filing an appeal, which in their opinion was frivolous (because of a lack of record) and therefore, it was assumed, was filed to delay the payment

of the court costs in the underlying superior court judgment.

Instead of operating as a shield for indigent litigants, the California Court used the provisions of Cal. Rules of Ct., Rule 7, as a sword, penalizing an indigent litigant by the inconsistent application of the statute, going so far as to impose an unprecedented monetary sanction of $10,000.00. Ironically, *a large part of these sanctions comprise Respondents' costs in obtaining the reporter's transcripts,* which the Petitioner was not able to pay for in the first place in order to make his record on appeal.

The inescapable conclusion is that the Court of Appeals sanctioned Petitioner for not being an attorney and for being poor. Further, the Court of Appeal did not give the attorney appearing *pro bono* to argue the appeal a chance to explain why the action was not frivolous, effectively denying Petitioner the right of counsel. This runs contrary to the Fourteenth Amendment's spirit of providing meaningful access to the justice system by the public and its stated purpose that no "State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The courts of record in California are under no duty at law to provide a transcript on appeal. It has been assumed that it is a matter of discretion as to whether or not the court will do so. *Leslie v. Roe,* 41 Cal. App. 3d 104 (1974), *Smith v. Superior Court of the County of Los Angeles,* 41 Cal. App. 3d 109 (1974), and *Crespo v. Superior Court of the County of Los Angeles*, 41 Cal. App. 3d 115 (1974).

Federal law has found a denial of due process when a State court refused to allow welfare recipients to file for divorce because they lacked funds for filing and process server fees. *Boddie v. Connecticut*, 401 U.S. 371 (1971). The issue of the denial of a *gratis* transcript in a civil appeal has yet to be considered to be a denial of due process; it is time for the Court to do so.

Originally, California Rules of Court, Rule 7, defined a fair and equitable procedure on how all parties should address the issue of preparing a settled statement when no court transcripts exist due to a natural disaster, fire at the court house, or some other circumstance which would put all parties on equal footing as to the availability of court reporters transcripts.

Later, the Legislature used the existing framework of Cal. Rules of Ct., Rule 7, to provide an economic alternative to a reporter's transcript for indigent. Cal. Rules of Ct., Rule 7, does not provide due process or equal protection under the law as provided in the Fourteenth Amendment when a class of people, as in this case an indigent litigant, can't afford to purchase the transcript and the opposing side can. The prejudicial results of the application of Cal. Rules of Ct., Rule 7, are displayed in this case. The trial court allowed the Respondent's Amended Settled Statement to be engrossed, ignoring Petitioner's Settled Statement During Trial. Further, as exemplified in this case, when the trial judge engrossed Respondents Settled Statement, the issues presented in the settled statement become distorted. Thus, Petitioner's appellate issues were eliminated, in effect, by Respondent's engrossed settled statement. Petitioner was left with no facts supporting his appeal. [*See Quail v. Municipal Court,* 171 Cal. App. 3d 572 (1985) where it was error to have respondent, rather than appellant, engross the settled statement, and ordering the court to prepare new settled statement; *Keller v. Superior Court in and for the County of Los Angeles,* 100 Cal. App. 2d 231 (1963) where a ruling authorizing appellant to proceed by settled statement does not allow trial judge to arbitrarily refuse to settle record without disclosing a single item of relevant testimony that was omitted from the proffered statement on appeal; Cal. Rules of Ct., Rule 7d, "At the time set for the hearing ....the judge shall settle the statement and fix the time within which the appellant shall engross it as settled."]

The Honorable John F. Herlihy's order states on page 1, line 28:

> "IT IS HEREBY ORDERED that the "Proposed Amendments To Settled Statement" filed herein on July 1, 1996, by Respondents, be the engrossed settled statement for purposes of the judgment in this matter."

1. <u>This Issue Falls Under The "Equal Protection Under The Law" Guaranteed By The Fourteenth Amendment.</u>

"The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions." Justice Frankfurter once wrote. "They do not relate to abstract units, A, B, and C, but are expressions of policy arising out of specific

difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

The specific issue of equal access to civil courts by indigents involves the discriminatory application of Rule 7 against the very class it was intended to protect as a result of the inaccessibility, due to cost, of the court transcript necessary to perfect an appeal in the State of California.

a. California Rules of Court, Rule 7, Creates A Class Of People Out Of Indigents And Discriminates Against Them.

By attempting to provide an adequate remedy to an identified social problem, i.e. access to courts by indigents, Cal. Rules of Ct., Rule 7, discriminates against indigents who afford themselves of the alternative procedure. As described herein, the alternative method supplied by Cal. Rules of Ct., Rule 7, has created for indigents to prepare their appeal falls short of the desired goal and results in the appeals process being discriminatory.

When discrimination is based upon economic status, as with Cal. Rules of Ct., Rule 7, it may be prohibited under the Fourteenth Amendment. "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier v. Connolly*, 113 U.S. 27, 32 (1885). The public purpose of Cal. Rules of Ct. , Rule 7, is to afford indigent litigants access to a record on appeal. However, the "settled statement" merely provides a sham record, while those in a superior financial position have access, through the actual transcripts, to the "true" record. Litigants are not given equal access by this law. Rather, Rule 7, in effect, codifies unequal treatment under the law. Adversaries are not 'playing on an equal field.'

Cases interpreting the Fourteenth Amendment have established criteria defining its scope. In *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) and in *Williamson v. Lee Optical Co.* 348, U.S. 483, 489 (1955) the court stated "statutes create many classifications which do not deny equal protection; it is only 'invidious

discrimination' which offends the Constitution." In other words a classification which causes harm is of an objectionable nature. In setting forth the elements of "invidious discrimination" the courts find that "[a] classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, to that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) Cal. Rules of Ct., Rule 7, on the surface appears to have established a classification to handle indigents. However, where the practical ramifications of Cal. Rules of Ct., Rule 7, are applied, two indigents are not pitted against each other. Cal. Rules of Ct., Rule 7, is arbitrary in its application, thus relegating all indigents who represent themselves to having no meaningful access to the appeals court process.

b. Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection.

Although the majority of the high profile cases which support the status of "wealth distinctions *per se* as a suspect classification" *San Antonio School Dist. V. Rodriguez*, 411 U.S. 1 (1973) are on the criminal side of the justice system, there is no doubt that the fundamental issue before the court as it relates to access to the appeals court system is considered fundamental in nature in the structure of our polity. "In criminal trials," Justice Black wrote in *Griffin v. Illinois*, 351 U.S. 12 (1956) in the plurality opinion, "a state can no more discriminate on account of poverty than on account of religion, race, or color." While the State was not required to provide an appeal at all, when it does so it may not structure its system "in a way that discriminates against some convicted defendants on account of their poverty. There can be no equal justice where the kind of trial a man gets is depends on the amount of money he has." *Id.*, at 17, 18, 19.

In *Douglas v. California*, 372 U.S. 353, 361 (1963) this issue was further defined: "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not

eliminating them entirely." Cal. Rules of Ct., Rule 7, was the State of California's effort to redress the economic imbalances, which are obvious in the appeals process for an indigent. Yet the practical applications of Rule 7 are that the indigent is still left without access to due process through the appeals court system.

Criminal proceedings have long since recognized the prejudicial effects of the lack of a transcript and its impact on the appeals process in criminal cases. This same prejudicial impact to due process occurs in civil trials also. Treatment of poverty in an analysis of "fundamental interest" in civil settings occurred in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966) in which it was held that "a State violates the Equal Protection Clause whenever it makes the affluence of the voter or payment of any fee an electoral standard." "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or poverty, like those of race, are traditionally disfavored." *Id.*, 668. Although the right to vote is fundamental to a democracy, of no less importance is the fundamental access to the court systems for all. To discriminate based upon wealth, as in the issue before the court, is to leave the indigent stranded in the court systems and deny him or her due process.

2. <u>The Imposition Of Sanctions Deprived Petitioner of Property Without Due Process.</u>

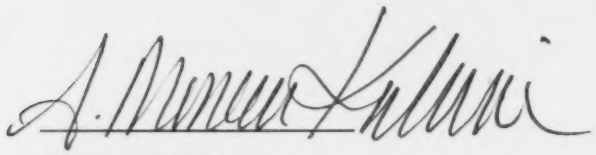
After the Superior Court and then the Appeals Court inconsistently applied Cal. Rules of Ct. , Rule 7, and invited the error used as the basis for their decision, as discussed in Issue One above, at the request of the Respondents, sanctions were issued for $10,000.00 against an indigent Pro Per. The $10,000.00 sanctions imposed by the court in effect reimbursed the Respondents, a multi-billion dollar bank, for their costs associated with the purchase of the transcript that was denied to the Petitioner because of his economic status.

Petitioner has been denied due process and assessed sanctions by the Appeals Court as the result of the Petitioner having to file under Cal. Rules of Ct., Rule 7.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Monem Kabir

In Propria Persona
5337 Celia Court
Fremont, CA 95053

Date: February 13, 1998

APPENDIX

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FILED
SEP 11 1997
Court of Appeal - Sixth App. Dist.
Michael J. Yerly, Clerk
By_____

MONEM KABIR,
Plaintiff and Appellant,
v.

SILICON VALLEY BANK et al,
Defendants and Respondents.

H014744
(Santa Clara County Super. Ct. Nos.719610, 719611)

Monem Kabir appeals from a judgment against him following a jury trial. Kabir's compliant included claims against his former employer USM Technology, 1 an intentional interference with employment contract claim against Silicon Valley Bank (SVB), a lender which had made loans to USM Technology, and against Robert McMillan, a SVB employee, and a defamation claim against SVB and Michael Hansen, a former SVB employee who was assigned to USM Technology account after USM Technology had defaulted on its loan obligations. Costs were awarded to Silicon Valley Bank, McMillan, and Hansen against Kabir.

Discussion

Appellant Kabir proceeded by way to settled statement in lieu of a reporter's transcript pursuant to rule 7 of the California Rule of Court. Subdivision (b) of that rule provides in pertinent part: "[T]he appellant shall serve and file a condensed statement in narrative form of all or such portions of the oral proceedings as are deemed material to the determination of the points on appeal.... If the condensed statement purports to cover only a potion of the oral proceedings, the appellant shall state the points to be raised on appeal, and in that event shall be precluded from presenting any

---

1 USM Technology filed a bankruptcy petition before trial.

Appendix "A"

grounds for reversal not embraced within the points stated unless the reviewing court, on motion, permits the appellant to present additional errors or grounds of appeal on such terms as it may prescribe." Kabir stated seventeen different issues to be raised on appeal.

In his opening appellate brief, Kabir raises only two issues. He first contends that a special verdict question on the defamation claim against Hansen was confined to the issue before the court and was and was inconsistent with the jury trial instructions, with the trial, and with the law. The special verdict question read: "If you found that defendant Mike Hansen made a defamatory statement that plaintiff Monem Kabir engaged in criminal activity while employed at USM technology, was that statement true?" The jury answered, "Yes."

Specifically, Kabir complains there was no evidence to support a jury finding of criminal activity 2 and there was no Jury instructions defining criminal activity. He asserts that jury instructions no. 26 regarding slander misled the jury regarding the meaning of criminal activity 3.

Kabir claims that these issues were stated in his settled statement as the second issue, which reads: "The judicial error associated with the entry of judgement following the jury trial, at the conclusion of which a verdict was rendered that is unclear and contradicts itself.' We agree with respondents that the insufficiency of evidence and instructional error contentions which Kabir is now attempting to raise were not points specified in the settled statement.

---

2 The settled statement does not contain a condensed statement in narrative form of all the portions of the oral proceedings which are material to the determination of the sufficiency of the evidence for this finding.

3 The settled statement does not contain the slander instructions actually given to the jury by the court. The clerk's transcript contains a proposed instructions no. 26 and the record reflects that it was given as modified. The settled statement states the jury instructions and the jury verdict form were submitted jointly by all parties, including Kabir, all parties approved the form of the instructions and the verdict, and no objections regarding them were raised by Kabir.

Therefore, they are barred. (Cal. Rule of Court, rule 7.) Kabir secondly argues in his opening brief that the court erroneously admitted into evidence two exhibits, designated as "Open Receivables 8/30," which were used to establish incompetence in his business affairs 4. He contends that "[i]t was a judicial error that this information was allowed into trial over the objection of counsel since the documents were not timely presented to the opposing side nor to the court for a proper inspection and examination.' Kabir claims that this issue was stated in his settled statement as the fifth issue, which reads: "The defense withheld evidence from the plaintiffs during the discovery phase of the trial."

We agree with respondents that the alleged trial court error of erroneous admission of evidence over objection was not a point specified in the settlement statement. Therefore, we find it barred.

Even if the issue were not barred, it would be waived under Evidence Code section 353. The settled statement indicates that the only objections made by Kabir to these documents was lack of authenticity.

Sections

The respondents in this case moved for an award of sections on the ground that the appeal was frivolous. (Cal. Rule of Court, rule 26 and 41; Code Civ. Proc., 907.) The appellant was notified that the court was considering imposing sanctions. (Cal. Rule of Court, rule 26(e).)

Code of Civil Procedure section 907 provides, "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." California Rule of Court, rule 26(a) provides in pertinent part, "Where the appeal is frivolous or taken solely for the purpose of delay . . . the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require."

---

4 A special verdict question on Kabir's defamation claim against Hansen read: "If you found that defendant Mike Hansen made a defamatory statement that plaintiff Monem Kabir was incompetent in his business affairs, was that statement true?" The jury answered "Yes."

The Supreme Court in In re Marriage of Flaherty (1982) 31 Cal.3d 637 set forth two standards, subjective and objective, for determining whether an appeal is frivolous. (Id. at p. 649.) Under a subjective standard, the court assesses the motives and good faith of the party and the party's attorney. (Ibid.) Under the objective standard, the court looks at the merits of the appeal and determines whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous. (Ibid.) The court concluded that "an appeal should be held to be frivolous only when it is prosecuted for an improper motive – to harass the respondent or delay the effect of an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree that he appeal is totally and completely without merit." (Id. at p. 650)

In this case, the appellant proceeded by settled statement which covered only a portion or the oral proceedings. The statement contained seventeen separate points to be raised on appeal.

According to the declaration of respondents' attorney submitted on the motion for sanctions, counsel was required to perform extensive legal work in regards to the settled statement, because of the confusing and argumentative nature of appellant's proposed statement.5 With three minor amendments, the court ordered the alternate proposed settled statement for appeal . (Cal. Rules of Court, rule 7.)

The appellant then attempted to raise different issues which were not specified in the settled statement and were barred. In addition, these issues were completely without merit insofar as can be determined form the settled statement. No reasonable attorney could have concluded there was any legitimate basis for making the contentions in appellant's brief.

---

5 In his declaration, the respondents' attorney states that $13,022.50 was incurred by respondents in connection with the settled statement, $4,602 was incurred by respondents in connection with the reply brief, and $1,900 was incurred by respondents in connection with the motion for sanctions.

We view this total lack of merit as evidence of an improper motive to avoid an adverse cost award and bad faith. We conclude that the appeal was frivolous and sanctions are warranted.

The judgment is affirmed. Sanctions are imposed against appellant in the amount of $10,000 in favor of respondents.

IN THE SUPEIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

MONEM KABIR,
Plaintiff,
v.

SILICON VALLEY BANK, ROBERT McMILLAN and MICHAEL HANSEN,
Defendants.

GREGORY RUEBUSCH,
Plaintiff,
v.

SILICON VALLEY BANK, ROBERT McMILLAN and MICHAEL HANSEN,
Defendants.

SILICON VALLEY BANK,
Cross-Complainant,
v.

MONEM KABIR and GREGORY RUEBUSCH,
Cross-Defendants.

(ENDORSED)
FILED
Oct 6 1 33 PM '95
STEPHEN V. LOVE
COUNTY CLERK
SANTA CLARA
COUNTY
BY_____DEPUTY

CONSOLIDATED AS CASE NO. 719610 (With Case No. 719611)

JUDGMENT UPON JURY VERDIC
(CCP § 664)

Trial by jury commenced in this action on August 29, 1995. Plaintiffs and Cross-Defendants Monem Kabir and Gregory Ruebusch were represented by Gregg L. Kays. Defendants Robert McMillan and Michael Hansen and Defendant and Cross-Complainant Silicon Valley Bank ("SVB") were represented by Stephen Kottmeier and Jay Ross.

Following the impaneling of a jury, the receipt of evidence and instructions of the jury, the jury deliberated on all causes of action and returned special verdicts on September 26, 1995. In conformity with those verdicts, the following Judgement is entered:

I. KABIR'S CLAIM FOR INTENTIONAL INTERFERENCE WITH EMPLOYMENT CONTRACT

On Kabir's claim of intentional interference with employment

contract against Defendants McMillan and Silicon Valley Bank ("SVB"), it was found that Kabir did have a invalid employment contract with USM Technology Corporation ("USM"), and it was further found that USM Technology did not breach this employment contract. Accordingly, judgement is to be entered against Kabir and in favor of McMillan and SVB on this claim.

II. KABIR'S CLAIM FOR DEFAMATION

On the claim of Kabir against Hansen and SVB for defamation, it was found that Hansen did publish oral statements that Kabir was incompetent in his business affairs and had engaged in criminal activity. It was further found that these statements of Hansen were true. Accordingly, judgement is to be entered in favor of Hansen and SVB and against Kabir on this claim.

III. RUEBUSCH'S CLAIM FOR DEFAMATION AGAINST MC MILLAN

On Ruebusch's claim of defamation against McMillan, it was found that McMillan did publish on oral statement to another person that Ruebusch was a liar and that the statement was used in a defamatory manner. It was further found that the average listener would regard the statement as defamatory and that Ruebusch proved the exact slanderous words that were used. It was further found that this statement was not true and the Ruebusch proved that McMillan either knew the defamatory statement was false or published the statement in reckless disregard for whether the matter was false. Accordingly, judgment is to be entered in favor of Ruebusch and against McMillan o this claim and damages in this amount of $1.00 are awarded. It was further found that this statement did not cause any actual injury or actual damages to Ruebusch.

IV. RUEBUSCH'S CLAIM FRO INTERTIONAL INTERFERENCE WITH EMPLOUEMTN CONTRACT

On the claim by Ruebusch of intentional interference with employment contract against McMillan and SVB, it was found that Ruebusch did have a valid employment contract with USM. It was also found that USM did not breach its employment contract with Ruebusch. Accordingly, judgment is to be entered in favor of McMillan and SVB and against Ruebusch on this claim.

V. RUEBUSHC'S CLIAM FOR DEFAMATION AGAINST HANSEN AND SVB

On Ruebusch's claim for defamation against Hansen and SVB, it was found that Hansen published oral statements that Ruebusch was incompetent in his business affairs and had engaged in criminal activities while employed at USM. It was further found

that Ruebusch proved the exact slanderous words that were used.

Further, it was found that the statement that Ruebusch was incompetent in his business affairs was true, but that the statement that Ruebusch had engaged in criminal activity while employed at USM was not true. It was further found that Ruebusch proved that Hansen knew the defamatory statement regarding criminal activity was false or that he published the defamatory statement is reckless disregard to whether or not it was false. It was also found that Hansen was acting as an agent for SVB at the time he made statement and that he was acting within the course and scope of his agency at that time. Further, it was found that SVB ratified and approved of Hansen's conduct in making the statement.

Accordingly, judgement is to be entered in favor of Ruebusch and against Hansen and SVB in the amount of $80,000.00. It was found that Ruebusch sustained no actual injury or damages as a result of this defamatory statement.

VI. SVB'S FRAUD CLAIM AGAINST KABIR

On SVB's fraud claim against Kabir, it was that Kabir had made one or more representations of material fact to SVB which representation(S) were false. It was found that Kabir knew that the representation(s) were false when he made them and that Kabir intended for SVB to rely upon the misrepresentation(s).

Further, it was found that SVB did rely on Kabir's misrepresentation(s) and that this reliance was reasonable.

Further, it was found that SVB did not suffer any damages as a result of the misrepresentation or misrepresentations of Kabir. Accordingly, judgment is to be entered in favor of Kabir and against SVB as to this claim.

VII. SVB'S NEGLIGENT MISREPRESENTATION CLAIM AGAINST KABIR

In accordance with the finding on the fraud claim against Kabir, judgment is to be entered in favor of Kabir and against SVB on the claim of negligent misrepresentation.

VIII. SVB'S FRAUD CLIAM AGAINST RUEBUSCH

On the fraud claim of SVB against Ruebusch, it was found that Ruebusch did make representations of material fact to SVB, but it was also found that these representations were not false.

Accordingly, judgment is to be entered in favor of Ruebusch and against SVB on this claim.

IX. SVB'S NEGLIGENT MISREPRESENTATION CLAIM AGAINST RUEBUSCH

In accordance with the findings on the fraud claim against Ruebusch, judgment is to be entered in favor of Ruebusch and against SVB on the claim of negligent misrepresentation.

X. CONSPIRACY CLIAMS AGAINS KABIR AND RUBUSCH

On the conspiracy claims against Kabir and Ruebusch by SVB, it was found that Ruebusch did not willfully, intentionally and knowingly join with any other person in a plan to defraud SVB. It was also found that Kabir did not willfully, intentionally and knowingly join with any other person in a plan to defraud SVB.

Accordingly, judgment is to be entered in favor of Ruebusch and Kabir and against SVB on this claim.

XI. COSTS

In accordance with the jury's verdict, costs are awarded as follows:

A. Plaintiff and Cross-defendant Gregory Ruebusch is awarded his costs of suit against Defendant Robert McMillan and Michael Hansen and Defendant and Cross-Complainant SVB;

B. Plaintiff and Cross-Defendant Monem Kabir is not awarded his cost or suit; and

C. Defendants Robert McMillan, Michael Hansen and Silicon Valley Bank are awarded their costs of suit against plaintiff and Cross-Defendant Monem Kabir.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. Plaintiff Gregory Ruebusch shall recover $1.00 from Defendant Robert McMillan, $80,000.00 from Defendant Michael Hansen and Silicon Valley Bank and costs pursuant to cost bill;

2. Plaintiff Monem Kabir shall recover nothing on his complaint;

3. Silicon Valley Bank shall recover nothing on its Cross Complaint; and

4. Defendants Robert McMillan, Michael Hansen and

Silicon Valley Bank shall recover their costs pursuant to cost bill from Plaintiff and Cross-Defendant Monem Kabir.

Dated: "/S/"
JOHN F. HERLIHY
JUDGE OF THE SUPERIOR COURT

Approved as to form:

"/S/"
Stephen Kottmeier for
Defendants

"/S/"
Gregg L. Kays for
Plaintiffs

Sixth Appellate District No. HO14744

SO65127

IN THE SUPREME COURT OF CALIFORNIA

MONEM KABIR, Appellant

V.

SILICON VALLEY BANK Et Al., Respondents

SUPREME COURT
FILED
NOV 19 1997
Robert Wandurff Clerk
H.CRUZ

DEPUTY

Appellant's petition for review DENIED.

"S/ George"

Chief Justice

Appendix "C"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

MONEM KABIR

Petitioner,

No. H015882
Super. Ct. No. 719610

Vs.

THE SUPERIOR COURT

OF SANTA CLARA COUNTY,

Respondent;

FILED
SEP 12 1996
Court of appeal -Sixth App. Dist.
By_____

SILICON VALLEY BANK, et al.,

Real Parties in Interest.

_____/

BY THE COURT

The application for waiver of court fees and costs filed on September 6, 1996, is granted. The petition for writ of mandate, prohibition, certiorari, or other appropriate relief is denied.

(Premo, Acting P.J., Elia , J., and Wunderlich, J. participated in this decision.)

Dated SEP 12 1996 PREMO Acting P.J.

Appendix "D"

Stephen J. Kottmeier, Esq., Esq. (State Bar No.077060)
Jay M. Ross, Esq., Esq. (State Bar No. 151750)
HOPKINS & CARLEY
A Law Corporation
150 Almaden Boulevard Fifteenth Floor
San Jose, California 95113-2089

Attorneys for Respondents
SILICON VALLEY BANK, ROBERT
McMILLAN and MIKE HANSEN

FILED
SEP 03 1996
County Clerk
Santa Clara County
By_____Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

MONEM KABIR, an individual,
Plaintiff and Appellant,

v.

SILICON VALLEY BANK; ROBERT McMILLAN; and MICHAEL HANSEN,
Defendants and Respondents.

Consolidated As Case No. 719610 (With Case No. 719611)
APPELATE CASE NO.:H-14744
ORDER FOR SETTLEMENT OF STATEMENT PURSUANT TO CALIFORNIA RULE OF COURT 7(d)

On August 28, 1996, in Department 12 of above-entitled court, the court conducted the hearing pursuant to California Rule of Court 7 to settle the statement for the appeal in the above-captioned matter by appellant Monem Kabir. Monem Kabir ("Kabir") appeared in propria persona, with his assistant Gregory Ruebusch, and Stephen J. Kottmeier and Jay M. Ross, attorney with Hopkins & Carley, a Law Corporation, appeared on behalf of respondents Silicon Valley Bank, Robert McMillan and Mike Hansen (collectively the "Respondents"). Upon consideration of the papers submitted by the parties, the pleadings and other documents on file in this matter, the record of the trial proceedings in this matter, the court's own recollection of events as the trial judge during the trial in this matter, as well as the arguments and statement made by Mr. Kabir and counsel for the Respondents, and good cause appearing therefor,

Appendix "E"

IT IS HEREBY ORDERED that the "proposed Amendments To Settled Statement" filed herein on July 1, 1996, by Respondents, be the engrossed settled statement for purposes of Kabir's appeal of the judgment in this matter, with the following three amendments:

(a) page 12, line 16 is amended to insert the following after the period at the end of that line: "Plaintiff's counsel did not object to this argument by defense counsel."

(b) Page 17, line 3 is to be amended, following the procedure ordered below, with further language describing the court's reference to the testimony of Ori Azevedo as part of the basis for its conclusion that Exhibits 48 and 50 had been adequately authenticated.

(c) Page 18, line 3 is amended to read as Follows: "application and Judge Levinger set the hearing on the OSC to take place before trial."

IT IS HEREBY FURTHER ORDERED that both Mr. Kabir and Respondents may submit to the court proposed language for the amendment in (b) above with respect to the testimony of Ms. Azevedo. Those submissions shall be delivered to Department 12 of this court not later than the close of business (i.e., 4:00p.m.) on Friday, August 30, 1996. Mr. Kabir and Respondent may not submit anything other than the proposed language as requested herein. The court will select the language from one of the submissions or draft its own language to make this amendment.

IT IS HEREBY FURTHER ORDERED that upon the court's selection of the appropriate language for the amendment in (b) above, the pleading entitled "Proposed Amendments To Settled Statement, filed on July 1, 1996 herein, as amended by this order and the courts, selection of language for (b) above, shall be deemed and certified by this court to be the Settled Statement for the appeal of this action without the necessity of any further in this matter.

ORDER

IT IS SO ORDERED

DATED: SEPT. 3, 1996

"S/ JOHN F. HERLIHY"
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FROM.

BY_____

Sixth Appellate District No. H015882

S056285

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
NOV 20 1996
Robert Wandurff Clerk

DEPUTY

MONEM KABIR, Petitioner

V.

SANTA CLARA COUNTY SUPERIOR COURT, Respondent

SILICON VALLEY BANK Et Al., Real Parties In Interest

Petition for review DENIED.

"S/ George"

Chief Justice

Appendix "F"

Supreme Court, U.S.
FILED
MAR 18 1998
CLERK

No. 97-1341

In The Supreme Court of the United States

OCTOBER TERM 1997

MONEM KABIR,

Petitioner,

v.

SILICON VALLEY BANK
ROBERT MCMILLAN
MICHAEL HANSEN,

Respondents.

On Petition for Writ of Certiorari to the California State Supreme Court

BRIEF IN OPPOSITION

Stephen J. Kottmeier
Counsel of Record
Hopkins & Carley, A Law Corporation
Ten Almaden Boulevard, 8th Floor
San Jose, California 95113-2228
(408) 286-9800

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

BRIEF IN OPPOSITION TO PETITION

I INTRODUCTION

This brief is submitted by Respondents Silicon Valley Bank ("SVB"), Robert McMillan, and Michael Hansen in opposition to the Petition For Writ of Certiorari ("Petition") in this case. The Petition is replete with misstatements of fact and law. No grounds exist to warrant this Court's review of this private dispute, which should long ago should have ended.

II RESPONSE TO PURPORTED STATEMENT OF THE CASE

Petitioner purports to recite events which occurred beginning in 1990 and concluding in 1997. The jury trial in 1995 lasted sixteen court days and included the testimony of nineteen witnesses. It also included the introduction into evidence of fifty-six exhibits. Ninety pages of jury instructions were given. Petitioner's recitation misstates, mischaracterizes and oversimplifies these years of events.

Major points of error are corrected as follows:

1. In the summer of 1991, SVB through McMillan requested that its borrower USM Technology, Inc. provide to it financial information in accordance with the loan agreements entered into by the parties. USM failed to do so on a timely basis. (Petition, at 5.)

2. In the late summer of 1991, at a meeting of McMillan, Petitioner and Petitioner's co-plaintiff, Petitioner became belligerent and abusive of Mr. McMillan. Testimony regarding this meeting was lengthy and conflicting among the participants.

3. Mr. McMillan did not have a "series of personal conflicts" with Petitioner. Petitioner's co-plaintiff wrote a letter to the president of SVB complaining and with a threatening tone. In response, the president did agree to substitute another loan officer as the loan officer on the USM account. Respondents' assertion is that the belligerency of Petitioner and the threatening letter was an effort to keep SVB from discovering through McMillan the fraud being perpetrated upon it by Petitioner. (Petition, at 5.)

4. Both Mr. McMillan and the majority owner of USM testified that Mr. McMillan did not urge USM to

terminate either Petitioner or his co-plaintiff. The jury found in favor of Respondents on the claims of Petitioner and his co-plaintiff that Respondents SVB and McMillan had allegedly interfered in their employment relations with USM. None of the Respondents made accusations of theft by Petitioner from USM. A cross-complaint for fraud as to SVB was filed in the litigation. (Petition, at 5.)

5. Mr. Won Choe was not an agent of SVB and has never been found by any court to be so. USM was not in receivership from February, 1992. On motion of SVB to the Santa Clara County Superior Court, Jerome Robertson was appointed Receiver for USM in August, 1992. (Petition, at 5-6.)

6. No material "irregularities" existed in SVB documentation for the USM relationship. The material allegations in the 1996 lawsuit filed by Petitioner and his on-going co-plaintiff have been denied. In particular, SVB and its employees did not engage in fraud, conspiracy or intentional interference with contractual relationship. (Petition, at 6.)

7. A temporary restraining order was issued with respect to Petitioner's self-styled newsletters in July, 1995. In addition, a restraining order was issued by the trial judge precluding dissemination of the documents within one mile of the court house during the trial of the case. Finally, in the Fall of 1996, the Santa Clara County Superior Court issued two preliminary injunction orders restraining Petitioner and his colleague from certain activities related to the so-called newsletters. Those last injunctions remain pending as of this writing. (Petition, at 6.)

8. The jury was instructed fully based upon instructions which were jointly submitted by Respondents and Petitioner (through his then attorney of record). No objection was made to the instructions through judgment in the case. No motion for new trial was made. The issue was not raised until Petitioner sought the court's approval of a settled statement in the middle of 1996.

9. The jury in a special verdict found, among other things, that Petitioner had made material misrepresentations to SVB with intent to defraud SVB, but awarded SVB "0" damages. (Petition, at 7.)

10. None of Respondents or the court had prepared a full transcript of the oral proceedings before the trial court. Some limited testimony was transcribed and copies of those transcriptions were purchased by Respondents. Respondents' counsel was advised during the course of trial that Petitioner and his co-plaintiff, through their attorney of record, had also purchased the same partial transcripts. (Petition, at 8.)

11. Petitioner filed a proposed Settled Statement with the trial court. The trial court ultimately held that the proposed statement wholly failed to meet the requirements for a settled statement. Instead, Petitioner's proposal was replete with argument, misstatements and material which was not part of the oral proceedings before the court. In response to Petitioner's proposed Statement, Respondents' counsel struggled with attempting to articulate amendments. Respondents' counsel finally concluded that the only approach which made any sense was to re-write the statement, including verbatim Petitioner's list of issues on appeal, but correctly summarizing the oral proceedings before the court. The trial judge held as follows:

THE COURT: All right. After having spent a considerable period of time reading through all the pleadings and proposals that have been submitted on behalf of both sides, it seems clear to me that I understand the frustration that the defense must have had to try to make heads or tails out of your proposed settled statement, Mr. Kabir. With all due respect. I understand you are not an attorney. And you made an effort to comply with the rules. But the problem with your settled statement is that it's -- it's just -- three-quarters of it is argument. It's just not what the Court or the rules have in mind in terms of a settled statement. And one of the suggestions made by the defense in this case was to simply strike it and leave you to your own devices as to where you go from there.

However, after having reviewed the defendants' document, which is titled "Amendments To Settled Statement," which is really a counter proposal and is a fully engrossed attempt to settle the statement on appeal, I think the defense did a very good job at taking the issues and putting forth a settled statement in the format that is required by the Rules of Court.

> And so the Court is going to adopt as the settled statement what has been denominated as "Proposed Amendments to Settled Statement" with the following changes....

Reporter's Transcript of Proceedings, August 28, 1996, at 28:15-29:14 (Petition, at 8.)

12. Petitioner's characterization of the contents of a letter, which he proposed be added to the appellate record, is incomplete and wrong. (Petition, at 9.)

III LIMITED RESPONSE TO PURPORTED REASONS TO GRANT PETITION

The problem at the heart of this matter is not whether the California rule regarding settled statements denies equal protection to a class of persons. The settled statement procedure is available to any person or case meeting the criteria set forth in California Rule of Court 7. The problem here was that Petitioner failed to comply with the simple requirement of submitting a statement in narrative form of the oral proceedings before the trial court. The failings of what he did submit are detailed in the memorandum submitted to the California trial court at the time. In lieu of striking the statement as a whole, the trial court found the

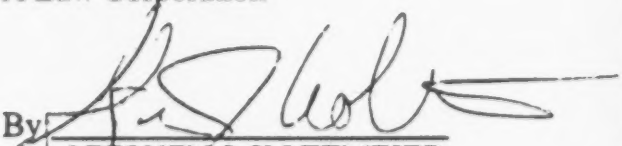
rearticulation supplied by Respondents to be a fair summary of the oral proceedings related to each issue specified by Petitioner.

In fact, the portion of the settled statement prepared by Respondents had no relation to the principal reasons that the California appellate court cited for affirming the judgment. In the opinion attached to the Petition, the court plainly specifies Petitioner's failure to state the two issues he attempted to raise in his appeal in connection with the Settled Statement proceedings. The issues recited in the Settled Statement prepared by Respondents were verbatim the issues included by Petitioner in his proposal for a statement. The problem with the appeal was Petitioner's fault and not that of Respondents or any court. This petition should be denied.

Respectfully submitted,

DATED: March 13, 1998.

HOPKINS & CARLEY
A Law Corporation

By 
STEPHEN J. KOTTMEIER
Attorneys for Respondents

Supreme Court, U.S.
FILED
MAR. 24 1998
CLERK

(3)

No. 97-1341

In The

Supreme Court of the United States

OCTOBER TERM, 1997

MONEM KABIR

Petitioner,

V.

SILICON VALLEY BANK

ROBERT MCMILLAN

MICHAEL HANSEN

Respondents.

On Petition For Writ Of Certiorari
To The California State Supreme Court

PETITIONER'S REPLY BRIEF

MONEM KABIR
In Propria Persona
4557 Celia Court
Fremont, California 94555
(510)797-6472

9pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

OBJECTION TO BRIEF IN OPPOSITION.....1

I. INTRODUCTION.....1

II. THE RESPONDENTS OPPOSITION DEMONSTRATES WHY THE COURT SHOULD GRANT PETITIONER'S PETITION.....2

III. REPLY TO LIMITED RESPONSE TO PURPORTED REASONS TO GRANT PETITION.....5

CONCLUSION.....6

TABLE OF AUTHORITIES

Page

STATUTES AND RULES

Rules Of The Supreme Court of the United States
Rule 5.....1

Rules Of The Supreme Court of the United States
Rule 9.....1

Rules Of The Supreme Court of the United States
Rule 15.6.....1

Cal. Rules of Ct., Rule 7 .....4, 6

OBJECTION TO BRIEF IN OPPOSITION

Petitioner objects to the filing of Respondents "Brief in Opposition" as he is informed and believes that it is violative of Rules 5 and 9 of Rules of the Supreme Court of the United States in that counsel for Respondents has not been admitted to practice before this Court.

Secondly, Respondents offer no court documents to substantiate their "Statement of Facts" except for one quote from Judge Herlihy taken out of context.

Last, Petitioner requests that Respondents' Statement of Facts be stricken on grounds that is prejudicial, irrelevant, misleading and an attempt to misdirect the Court's attention from the issues on appeal.

Petitioner therefore asks that the Brief in Opposition be stricken in its entirety.

I. INTRODUCTION

This brief is submitted by Monem Kabir ("Petitioner") in a timely manner, under Rule 15.6 of the Rules Of The Supreme Court Of The United States, in reply to the Brief in Opposition ("Opposition") filed by Respondents Silicon Valley Bank ("SVB") Robert McMillan, and Michael Hansen. Respondents offer no opposition beyond their misrepresentations in the Statement of Facts, and cite no legal no authority contrary to Petitioner's Fourteenth Amendment arguments.

Respondents have chosen not to address the core arguments at the heart of Petitioner's brief. In fact, Respondents' brief demonstrates why and how the situation giving rise to Petitioner's brief has occurred.

II. THE RESPONDENTS OPPOSITION DEMONSTRATES WHY THE COURT SHOULD GRANT PETITIONER'S PETITION

Respondents' Counsel's misrepresentation and bending of facts is a true measure of the reality of this case. Petitioner responds to Respondents' specific representations as follows:

There have never been any allegations or evidence presented regarding USM Technology, Inc. being in violation of any covenants requiring the filing of financial information in a timely manner. If this is a defense for Respondents in the new litigation involving the same parties, this is the first time it has been raised in this litigation in seven years. (Brief In Opposition, para. 1, pg. 2.)

Respondents fail to mention that there were witnesses present at the meeting they are discussing, who testified that Mr. McMillan was the belligerent party. Further, there were apology letters written by Mr. McMillan to the Petitioner regarding Mr. McMillan's inappropriate behavior that were presented as evidence at the trial. (Brief In Opposition, para. 2, pg.2.)

Respondents misrepresent the facts by attempting to tar the Petitioner with information not otherwise introduced at trial. Mr. McMillan sent an apology letter to the Petitioner and this was presented as evidence during the trial. This action contradicts the Respondents' position. Respondents' statement that McMillan's discovery of fraud becomes even more unfounded when the judgment in the trial of October 6, 1995, is reviewed. (Petition, Appendix "B") The court found there was no fraud. (Brief In Opposition, para. 3, pg. 2.)

In the court testimony presented at trial, evidence was given as to libelous remarks directed at plaintiffs, including allegations of theft, made by Respondents and management of USM Technology, Inc.. Petitioner's Co-plaintiff, Mr. Ruebusch, was awarded $80,000.00 in damages for these remarks. The Respondents would like the court to believe that they prevailed

on their fraud action in cross-complaint. They did not. (See the Judgment Ruling, Petition, Appendix "B") (Brief In Opposition, para. 4, pg. 2 and 3.)

Furthermore, Mr. Choe admitted to being an agent of Silicon Valley Bank by a verified answer to the complaint in the companion case, Kabir and Ruebusch v. Silicon Valley Bank, et al., Superior Court of the State of California County of Santa Clara case number CV760042 where he states:

> "as and for a eighteenth affirmative defense, this answering defendant alleges that plaintiff's third cause of action is barred, in whole or in part, in that any acts this defendant committed which are a basis of said cause of action were justified to protect legitimate business interest of defendant SVB." Underlining added. (Brief In Opposition, para. 5, pg. 3.)

Respondents are correct to the extent that Respondents have denied the allegations of the subsequent "companion case." Their exclusions, however, amount to intentional misrepresentations. There has been no adjudication of these facts, except that Respondents and Co-defendants have failed on three demurrers and one Motion for Summary Judgment to have Petitioner's claims thrown out of court. Superior Court of the State of California County of Santa Clara case number CV760042 includes causes of action for Fraud, Conspiracy to Defraud, Intentional Interference With Economic Relationship against Silicon Valley Bank, McMillan, certain officers and remains very active. (Brief In Opposition, para. 6, pg. 3.)

The Respondents mislead the courts by failing to mention that the restraining order of July, 1995, was granted at an ex-parte hearing and was overturned on First Amendment grounds at a hearing for permanent injunction as soon as Petitioner's attorney returned from vacation. Further, the pending injunctions granted in the fall of 1996 (in the subsequent "companion case") were interestingly, granted after a year and a half of Petitioner's

publishing of over 40 issues of the "Do You Know The Truth? " newsletter and are on appeal with the State of California, Sixth District Court of Appeals. (Brief In Opposition, para. 7, pg. 4.)

The issues raised by Petitioner regarding the jury instructions were timely and properly raised during the Appeal process according to the rules of the California Sixth Appellate District Court and the California Rules of Appeals Court. No opinion issued by the Appellate Court has held there were any improprieties in this regard. (Brief In Opposition, para 8, pg. 4.)

The Petitioner was not found to have negligently misrepresented information with the intent to defraud. (Please refer to the Judgment upon jury verdict in the Petition filed, in Appendix "B", under section "VI and VII" for a true representation of the verdict. (Brief In Opposition, para. 9, pg. 4.)

Respondents' own pleadings contradict their Statement of Facts. The affidavits filed by the Respondents counsel in the Respondents' Notice Of Motion For Sanctions filed on January 21, 1997 in the California Sixth Appellate District Court states that he is requesting reimbursement of his fees which were incurred due to among other things, "selecting transcript citations." The Respondents had the court transcripts. The sanctions requested were for $19, 524.50, the sanctions awarded and now part of this action before the court were for $10,000.00. In Respondents' opening paragraph to this section they refer to a sixteen-day trial, including the testimony of nineteen witnesses. Further, the transcript purchases made at trial were by the Co-Plaintiff, Mr. Ruebusch, and totaled under $250.00; hardly a record of this case. (Brief In Opposition, para. 10, pg. 5.)

The trial court has the authority, certainly, to require Petitioner to rewrite his Settled Statement. Respondent cites no authority for his proposition that the court may simply engross the opposing party's "summary" to settle its confusion. The petitioner must engross the settled statement under California Rules of Court, Rule 7. (Brief In Opposition, para. 11, pg. 5.)

Details of the Respondents' objection to the Petitioner's

Statement of Facts were omitted from the Brief in Opposition. Their objections have no factual basis and are nothing more than unsubstantiated opinion. Their objections should be ignored by the court. (Brief In Opposition, para. 12, pg. 7.)

Even if the Court accepts the version of facts in the Brief in Opposition as mere disagreement of fact between two parties, Petitioner's argument becomes self-evident. An indigent litigant has no access to a transcript to resolve the issue in his favor. Further, it is not a private issue, nor personal to Petitioner, when indigents in California are denied equal access and equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution. Only the presentation of the documents or transcripts themselves will provide a clear picture and answer the dispute regarding the facts.

III. REPLY TO LIMITED RESPONSE TO PURPORTED REASONS TO GRANT PETITION

Petitioner's legal arguments supporting the Petition for Writ of Certiorari are unchallenged. Respondents do not address the legal issue of equal protection under the law and access to justice guaranteed by the Fourteenth Amendment to the United States Constitution and how California Rules of Court, Rule 7, violates this guarantee.

Respondents' mere statement that California Rules Of Court, Rule 7, is available for anyone's protection doesn't address the issue that equal protection under the law is denied thereby, regardless of how many people use it. A law that cannot pass muster, should not be tauted as a placebo for the lower income and indigent population.

Further, the argument that "the portion of the settled statement prepared by Respondents had no relation to the principle reasons that the California appellate court cited for affirming the judgment" is a peculiar one to raise at this juncture. Respondents quote the Honorable Judge Herlihy when the

Petitioner's entire settled statement is erroneously rejected outright by the court and the Respondents entire Amendments to the Settled Statement was accepted. Even if the court reviews the Honorable Judge Herlihy's Statement,

> "But the problem with your statement is that it's -- it's just -- three quarters of it is argument. It's just not what the Court or the rules have in mind in terms of a settled statement."

There is no finding or indication of misrepresentation in appellant's Settled Statement, simply a disagreement on its contents. This disagreement was decided, wrongly, by substituting Respondents' Amendments for a true Settled Statement engrossed by petitioner. This action left the Petitioner without evidence for his issues on Appeal, which evidence did exist in the court transcript.

Respondents would have the court believe their "summary" reflected Petitioner's own facts. It did not.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve disputed issues on Appeal and to protect ordinary citizens of this land against misrepresentations in the court system and provide equal access to justice for a class of litigants who are barred from court transcripts for economic reasons.

Respectfully submitted,

3/24/1998

MONEM KABIR
In Propria Persona
4557 Celia Court
Fremont, CA 94555
(510) 797-6472